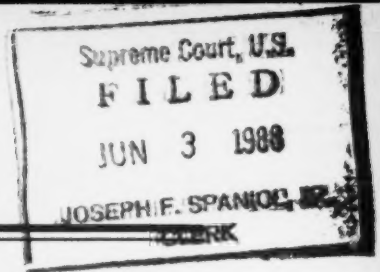


(3)
No. 87-1823



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL,
M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

Petitioners,

—against—

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL
MERCHANDISING CORPORATION AND PROSERV, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

In allowing Respondents to appeal pursuant to 28 U.S.C. § 1292(a)(1) from an Order of the District Court for the Southern District of New York which effectively denied the Respondents an injunction on the merits, was the Second Circuit correct where it found that Respondents would suffer serious, perhaps irreparable consequence if denied the right to pursue an immediate appeal?

RULE 28.1 STATEMENT

The parent of Respondent Volvo North America Corporation is AB Volvo, a Swedish corporation, shares of which are traded in the form of American Depositary Receipts on the NASDAQ over-the-counter exchange in New York. Volvo North America Corporation owns 76% of Volvo GM Heavy Truck Corporation, 24% of which is owned by General Motors Corporation. AB Volvo is the 100% shareholder of a Swedish subsidiary, Volvo BM, which owns 50% of a joint venture, VME Group N.V., of which the remaining 50% is owned by Clark Equipment Co.

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COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondent Volvo North America Corporation ("Volvo") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit by Men's International Professional Tennis Council ("MIPTC"), M. Marshall Happer, III and Philippe Chatrier (collectively "Petitioners").

In effect, Petitioners ask the Court to deem Section 1292(a)(1) amended to be limited to preliminary injunctions. Congress has not chosen to so limit the statute and there is no support in the prior decisions of the Court for such a narrow construction of the statute.

Proceedings Below

In April 1985, Respondent Volvo filed a summons and complaint against Petitioners MIPTC, M. Marshall Happer, III and Philippe Chatrier, the Administrator and then-Chairman of the MIPTC, respectively, alleging various federal antitrust and common law claims arising out of Petitioners' efforts to monopolize and restrain competition in the market for men's professional tennis.

On May 8, 1985, Petitioners moved to dismiss the Complaint. On or about July 3, 1985, prior to submission of that motion, Respondent Volvo served a First Amended Complaint (hereinafter "Complaint") (J.A. 7)¹, which made no substantive changes in its allegations concerning Volvo, and requested Petitioners' consent to the addition of Respondents International Merchandising Corporation ("IMC") and ProServ, Inc. ("ProServ") as additional plaintiffs. Petitioners agreed on the condition that all discovery be suspended pending a motion to dismiss the new Complaint. Respondents refused this condition. On September 11, 1985, the district court granted Respondents' motion to add plaintiffs and declined to restrict discovery.

The first five counts of the Complaint allege a group boycott, a combination and conspiracy to restrain trade, monopolization, attempt to monopolize and a conspiracy to monopolize, respectively, under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The sixth and seventh counts allege common law claims for interference with prospective business relationships and unfair competition.²

On September 13, 1985, Petitioners moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1), on the ground that some of the antitrust claims were not ripe for adjudication,

1 All references to "J.A." are to pages of the Joint Appendix filed in the Second Circuit.

2 Counts 8 through 13 of the Complaint are common law claims asserted by Volvo alone and are not the subject of the Appeal.

and Fed. R. Civ. P. 12(b)(6), on the ground that Respondents lacked standing to assert antitrust claims. Petitioners' motion was submitted to the district court on January 14, 1986.

On or about August 10, 1987, the district court dismissed the entire Complaint. *Volvo North America Corp. v. Men's International Professional Tennis Council*, 678 F. Supp. 1035 (S.D.N.Y. 1987). The district court addressed none of the issues briefed by the parties below but rather relied upon grounds neither briefed nor argued by any of the parties with respect to the federal claims. Its decision was thus an improper *sua sponte* determination. The district court also applied an incorrect standard for testing the sufficiency of the allegations by referring to Respondents' failure to establish or to demonstrate facts, citing authority more appropriate to a motion for summary judgment or a post-trial review. Finally, although the Complaint was the first pleading of ProServ and IMC and no substantive changes had been made in the pleading with respect to Volvo, the district court denied leave to amend with respect to the federal antitrust and certain other claims without stating any reason for the denial.³

Respondents Volvo and ProServ filed notices of appeal on September 8, 1987 and Respondent IMC filed its notice of appeal on September 9, 1987.⁴ On September 29, 1987, a staff attorney for the Second Circuit suggested that Respondents apply to the district court for the entry of a judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure in order to avoid litigating the issue of appealability. On the same day, the district court refused Respondents' request to appear and discuss such an application. Respondents were informed that the district court would not grant a motion pursuant to Rule 54(b)

3 The district court also dismissed the other common law claims (Counts 8 through 12) asserted by Volvo only, but granted Volvo leave to replead those claims.

4 Volvo does not "claim[] that it had not abandoned its right to seek to replead certain of its state law claims." (Petition at 5). The district court approved Volvo's request that it be allowed to replead those claims thirty days following disposition of Respondents' appeal to the Second Circuit.

even though the motion had not been formally presented or argued (Declaration of Robert S. Litt, executed on October 14, 1987).

On October 8, 1987, Petitioners moved to dismiss Respondents' appeal, arguing that the court below had no jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 1292(a)(1). After full briefing, the submission of affidavits from both Petitioners and Respondents and oral argument, the Second Circuit entered an order on February 8, 1988 denying Petitioners' motion to dismiss the appeals. On the record before it, the Second Circuit found that the dismissal of Respondents' claims on the merits, and the additional irreparable harm threatened by Petitioners pending final judgment, satisfied the test for interlocutory appealability pursuant to Section 1292(a)(1). *Volvo North America Corp. v. Men's International Professional Tennis Council*, 839 F.2d 69 (2d Cir. 1988) ("*Volvo v. MIPTC*") (a copy of which is attached to the Petition as A1-18).

Subsequently, Petitioners made two additional motions to the Second Circuit. The first, filed February 29, 1988, sought an order holding the appeal in abeyance pending the filing of the instant Petition. On April 11, 1988, Petitioners served with their brief on the merits a motion which sought an order striking various portions of Respondents' briefs as improperly including material not appearing in the record. Petitioners' motions were denied without opinion on March 16 and April 22, 1988, respectively.

Petitioners served and docketed the instant Petition on May 6. The appeal was argued in the Second Circuit on May 9.⁵

⁵ On November 6, 1985, Petitioners also answered and counterclaimed against Respondents and others, asserting antitrust and other claims. Respondents' motions to dismiss Petitioners' counterclaims were submitted to the district court on June 3, 1986. On May 18, 1988, the district court issued an opinion and order dismissing Petitioners' claims, with leave to replead certain of the common law claims.

The Injunctive Effect of Respondents' Action

Volvo is a corporation organized under the laws of the State of Delaware, with its principal place of business in New Jersey. Since 1973, Volvo has been increasingly active in the ownership, production and sponsoring of men's professional tennis events. Volvo conducts these activities, in part, in cooperation with Respondent ProServ which, like Respondent IMC, is a sports management company (J.A. 7-8). Volvo and its affiliates spend almost \$3 million annually in its tennis activities.

Petitioner MIPTC is a governing council of representatives from various organizations which produce or participate in tennis events. Respondents alleged, based upon the MIPTC's own Constitution and By-Laws, that the MIPTC is an unincorporated association consisting of nine members. Three of the representatives are elected by the International Tennis Federation ("ITF"), an association of more than 110 national tennis associations including those which own and produce the four Grand Slam events and which organize the Davis Cup events. Three representatives are elected by the owners of all other Grand Prix tournaments; that is, events holding a sanction from the MIPTC. The remaining three representatives are elected by men's professional tennis players (J.A. 9-10). Petitioner MIPTC claims that it is an association of more than 400 members including all of the tournament owners, all of the national tennis associations and all men's professional tennis players. Defendants' Counterclaims and Answer, ¶ 6.

In the Complaint, Respondents alleged that the MIPTC and certain co-conspirators conspired to monopolize and to restrain trade in the markets for the services of men's professional tennis players and the production of men's professional tennis events. The MIPTC schedules and sanctions events, including Wimbledon, the U.S. Open, the French Open and the Australian Open—the Grand Slam events. Generally, the Complaint alleges that the MIPTC's control over the Grand Slam events gives it control over virtually all top men's tennis players; without signing Commitment Agreements, which obligate them to play in various designated sanctioned events, the top players are

effectively barred from participation in the most prestigious events, the Grand Slam events. The Commitment Agreements, in turn, give the MIPTC the power to control the production of professional tennis events. Through the agreements, the players agree not to participate in certain non-sanctioned events, or Special Events. Thus, to ensure the attraction of the top players, and so the success of its tournament, a tournament producer must obtain a sanction from the MIPTC (J.A. 24-26, 31-36).

In or about September 1979, Volvo substantially increased its participation in the sport by agreeing to become the overall sponsor of the entire series of Grant Prix tournaments organized and scheduled by the MIPTC (J.A. 40). In 1984, Volvo was told that its bid for continued sponsorship of the Grand Prix had been defeated by Nabisco Brands. In 1985, however, Volvo learned of documentary evidence which indicates that the MIPTC leaked information concerning Volvo's confidential bid which resulted in a last-minute increase in Nabisco's offer but for which Volvo believes it would have been awarded the new contract for the overall sponsorship of the Grand Prix (J.A. 42).

Following the loss of the overall sponsorship, Volvo began using the phrase "Volvo Tennis" in conjunction with a picture of a tennis racket and a ball, which it had previously used in its sponsorship activities. On or about March 13, 1985, Petitioner Happer, administrator of the MIPTC, sent letters to NBC Sports, Public Broadcasting Service, ESPN, and USA Network and to various tournament owners and producers. These letters accused Volvo of deliberately and intentionally misleading the public into believing that Volvo continued as the overall Grand Prix sponsor. Happer requested that the television networks not permit the use of that logo by Volvo during their telecasts of any Grand Prix events. Happer sought to dissuade and intimidate the tournaments from associating with Volvo by threatening to withdraw the sanction of any tournament displaying a Volvo Tennis banner (J.A. 44-48).

In addition, Volvo believed that the MIPTC was about to adopt certain rules at its April 1985 meeting which would severely impair Respondents' ability to compete in the market for the production of tennis tournaments (J.A. 48-55). Faced with these continuing abuses of the MIPTC's monopoly power and attempts to further restrain any competition in men's professional tennis, Volvo commenced this action, alleging violations of the federal antitrust laws and seeking broad injunctive relief to stop the MIPTC's predatory conduct.

Volvo's commencement of the legal action stopped the MIPTC in its tracks. The MIPTC abandoned its plans to adopt the new rules and its vitriolic attacks on Volvo and its interference with Volvo's use of its Volvo Tennis logo ceased. Peace, however, was short-lived (C. 9-10)⁶.

Pursuant to a January 1985 agreement between Volvo and the MIPTC, the MIPTC agreed to sanction the Volvo Tennis/Chicago tournament to be produced by Volvo for three years, 1985 through 1987 (J.A. 106-08). In April 1986, the MIPTC scheduled the Volvo Tennis/Chicago event in 1987, so that it would compete with a Special Tokyo Event produced by ProServ and bring into play all of the restrictive rules which would require the top 100 players who had signed Commitment Agreements to forego that Special Event. Subsequently, in June 1986, ProServ and Volvo learned that major league baseball might change its opening day schedule which would require NBC to televise nationally baseball rather than the final match of the Volvo Tennis/Chicago tournament on April 5, 1987. The MIPTC refused to reschedule the tournament by one week to avoid the possible conflict with baseball (J.A. 108-13, 125).

Volvo filed an Order to Show Cause seeking a temporary restraining order and noticing a motion for a preliminary injunction. At a hearing held on September 24, 1986, the district court denied Volvo's application for a temporary restraining order and indicated that a motion for a preliminary injunction would also be denied. The court reasoned that Volvo would not be

6 All references to "C." are to pages of the Compilation of Selected Materials Filed with the Second Circuit.

prevented from obtaining television coverage for Volvo Tennis/Chicago on a local Chicago station, and that, even if the tournament were to be rescheduled, NBC could decide to breach that contract and "put on Sumo wrestling instead of tennis" (J.A. 141-42). While considering whether to appeal the district court's denial of its application, Volvo learned that major league baseball had decided not to change its schedule, and the issue became moot.

Apparently heartened by the attitude demonstrated at the September 24 hearing by the district court, in February 1987 the MIPTC proceeded to adopt a new rule which will require Volvo's co-Respondents to choose between producing MIPTC-sanctioned Grand Prix tournaments exclusively or acting exclusively as agents for men's professional tennis players.¹ This rule is effective with respect to tournaments commencing in January 1989 and thus did not present an issue of imminent irreparable harm prior to the August 10, 1987 decision (C. 10).

Finally, in 1987, the MIPTC advised Volvo that it would not renew the sanction for the Volvo Tennis/Chicago tournament, claiming that that sanction had been awarded only pursuant to the agreement of January 1985, which had expired (C. 10). Various attempts by Volvo and ProServ were made to convince the MIPTC that its decision was contrary to any rational economic analysis. Volvo Tennis/Chicago was one of the most successful tournaments in the entire Grand Prix, one of the few tournaments to receive major network television coverage and was held in one of the largest United States metropolitan areas. Volvo's efforts to reverse this decision were continuing when the district court announced its decision dated August 10, 1987 dismissing all of Volvo's antitrust claims without leave to amend.

Since the dismissal, Respondent ProServ has been advised that its Grand Prix tournament in Orlando will not receive a

1 In April 1985, the MIPTC was proposing, and apparently is still considering, a Special Events rule which would prohibit owners, agents, consultants and associates of sanctioned Grand Prix tournaments from promoting any Special Event.

MIPTC sanction for 1989. Moreover, the MIPTC has indicated that it will not approve a sanction for a buyer of that event. The MIPTC has also threatened the sanction of any other event having a relationship with the management companies, including the Boston Grand Prix event unless IMC's ownership interest and management of that event is terminated.

The district court's dismissal of Respondents' Complaint, just at a time when Petitioners were renewing their campaign of monopolistic and anticompetitive conduct directed at Respondents in particular, left Respondents with no legal basis upon which they could seek any injunctive relief against Petitioners. Without such relief, Respondents will have no protection against the continuing illegal conduct described in this brief or similar future illegal conduct.

SUMMARY OF ARGUMENT

1. Pursuant to Rule 18 of the Rules of the Court and general principles of judicial economy, the Petition should be denied because it is premature. No final judgment on the merits has been entered in the Court of Appeals for the Second Circuit, and this case is not one of "such imperative public importance" as to justify immediate review by the Court.

2. Pursuant to Rule 17.1(a) of the Rules of the Court, the Petition should be denied because the decision below does not conflict with the decision of any other Circuit Court of Appeals.

3. The Petition should be denied for the further reason that the Court of Appeals for the Second Circuit based its decision on factual matters peculiar to the litigants herein.

ARGUMENT

I

THE PETITION SHOULD BE DENIED AS PREMATURE

Rule 18 of the Rules of the Court militates against a grant of this Petition for a Writ of Certiorari. This is not a case of "such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18 (citing, *inter alia*, *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Petitioners make no such claim here.

Since the merits of the appeal are currently *sub judice* in the Court of Appeals for the Second Circuit, traditional principles of judicial economy support a denial of the Petition in this case. *McLish v. Roff*, 141 U.S. 661, 665 (1891) ("[The] policy of the acts of Congress in relation to appeals and writs of error, . . . ha[s] been to save the expense and delays of repeated appeals in the same suit . . ."). Were the Court to grant the Petition, any opinion on the merits issued in the interim by the Second Circuit in Respondents' favor might become moot and might render that court's efforts wasted. Similarly, an interim decision by the Second Circuit on the merits in Petitioners' favor would provide them with essentially the relief they seek in the Court, obviating the need for the Court's review.

Moreover, Petitioners have demonstrated no urgency herein which would arguably favor review by the Court prior to a final decision on the merits. Petitioners will suffer no harm in awaiting disposition by the Second Circuit of Respondents' appeal. Indeed, Petitioners' own arguments before the Second Circuit in support of their motion to hold the appeal in abeyance pending the filing of their Petition concede the inefficiencies stemming from their interlocutory Petition. There, Petitioners argued forcefully that an interim decision by that court on the merits would frustrate the principle of judicial economy. Brief of Appellees MIPTC, Happer and Chatrier in Support of Mo-

tion to Hold Appeals in Abeyance, dated February 29, 1988, at 3. Thus, the Petition should be denied as premature.

II

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION IN THIS CASE IS NOT IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL

Petitioners' characterization of the question presented by its Petition misconstrues the holding of the court below. Contrary to Petitioners' reading of the Second Circuit's opinion, that court merely applied the Court's holding in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) ("*Carson*"), to the facts before it. Thus, Petitioners' attempt to fashion a conflict among the circuits must fail; the Second Circuit's opinion is entirely consistent with those opinions from Circuits with which Petitioners contend the Second Circuit is in conflict.

Carson governs the appealability of interlocutory orders which have the practical effect of denying injunctive relief. *Accord Volvo v. MIPTC*, 839 F.2d at 73 (Petition at A11); see Petition at 7. *Carson* ruled that an interlocutory order having the practical effect of refusing an injunction may be appealed pursuant to Section 1292(a)(1) only where there is a showing of "serious, perhaps irreparable consequence," and the order can be "effectually challenged" only by immediate appeal. *Carson*, 450 U.S. at 78; *Volvo v. MIPTC*, 839 F.2d at 73 (Petition at A9).

Harmonizing the Court's earlier decision in *General Electric v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932) ("*General Electric*"), the *Carson* Court noted that a disposition on the merits of a counterclaim for injunctive relief satisfied the requisite showing of serious, perhaps irreparable consequence, deeming the dismissal to be similar in effect to the denial of preliminary injunctive relief. "[T]his decision 'resolved the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction.' " *Carson*, 450 U.S. at 86 n.11 (quoting *General Electric*, 287 U.S. at 430).

The Second Circuit, following *Carson's* reading of *General Electric*, ruled that the instant appeal from a dismissal on the merits of Respondents' claims for injunctive relief satisfied the *Carson* test for interlocutory appealability. The Second Circuit held that where the practical effect of a dismissal of a claim is to deny an application for injunctive relief, appellant must succeed in "establishing that the dismissal from which they appeal is a 'serious, perhaps, irreparable consequence' and can be 'effectually challenged' only by immediate appeal." *Volvo v. MIPTC*, 839 F.2d at 73 (Petition at A11) (quoting *Carson*, 450 U.S. at 78). Like the appellants in *General Electric*, the Second Circuit found that Respondents would suffer serious, perhaps irreparable consequence without immediate review in part because their right to injunctive relief has been finally adjudicated. *Volvo v. MIPTC*, 839 F.2d at 75-76 (Petition at A14-16).

An action for permanent injunctive relief, as here, involves continuing illegal activities which at any time during the pendency of the action may give rise to a need to apply to the district court for preliminary injunctive relief. One very practical reason for allowing immediate appeals from orders dismissing claims for permanent injunctive relief on their merits is that the plaintiffs would be deprived of the opportunity to seek expeditious preliminary relief if resort to an appellate court for relief from the erroneous decision of a single district court judge were blocked indefinitely. An application for preliminary relief cannot be made unless the harm threatened is imminent; a plaintiff cannot obtain expeditious protection from imminent irreparable harm if it has no underlying claim upon which to base its application for interim relief. Cf. *Carson*, 450 U.S. at 85 and n. 10.

That the Second Circuit has followed *Carson* is made clear by the more recent Second Circuit opinion in *Chasser v. Achille Lauro Lines*, Nos. 87-9081, 87-9083, 87-9085, 87-9087, 87-9089, 87-9091, slip op. (2d Cir. April 7, 1988). In *Chasser*, the Second Circuit, by a panel including Circuit Judge Mahoney, the author of the *Volvo* opinion, stated unequivocally:

[E]ven if such a denial [of a motion to dismiss on the basis of forum selection clauses] were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss [the appeal], for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence,' " and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S.Ct. at 1184 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours).

Chasser v. Achille Lauro Lines, slip op. at 2539.⁸

Petitioners contend that the Second Circuit erred in interpreting *Carson* to permit the appeal despite Respondents' failure to move for preliminary injunctive relief below, and it is this error which Petitioners contend creates the conflict among the circuits (Petition at 14).⁹ Yet nothing in *Carson* makes an applica-

8 In an effort to point to a conflict in the Circuits, Petitioners contend that the Second Circuit has taken sides with the approach adopted by the District of Columbia Circuit, citing that court's opinion in *Center for Nat'l Sec. Studies v. CIA*, 711 F.2d 409 (D.C. Cir. 1983). As illustrated above, the Second Circuit has simply adopted the test enunciated in *Carson*. Moreover, Petitioners mistake the holding of the District of Columbia Circuit in *Center for Nat'l Sec. Studies* (Petition at 8 n.6). The statements made there concerning the appealability of orders which have dismissed claims on the merits are mere *dicta*; the court ultimately applied *Carson*'s irreparable consequence assessment to the facts at bar and held the order non-appealable under Section 1292(a)(1). *Center for Nat'l Sec. Studies*, 711 F.2d 409, 414 ("Since [appellant] has failed to show serious, perhaps irreparable, harm resulting from denial of review we lack jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district judge's grant of summary judgment to CIA on count VII.").

9 As discussed *supra*, Petitioners misstate the record in this respect. Volvo did apply for a temporary restraining order in the district court and was summarily and perfunctorily denied an Order to Show Cause

tion for preliminary injunctive relief a prerequisite to satisfying the serious, perhaps irreparable consequence criterion.

Indeed, no such prerequisite is required by the First, Third or Federal Circuit cases cited by Petitioners (Petition at 15-16, 20). In *Woodard v. Sage Prods., Inc.*, 818 F.2d 841 (Fed. Cir. 1987) (*en banc*), the court did not rule that an appellant's failure to move for preliminary injunctive relief was dispositive of its entitlement to appeal an order which denied it permanent relief. Rather, the court merely observed: "It simply does not hold true that harm *pendente lite* is present whenever a permanent injunction is disposed of on the merits of the claim." 818 F.2d at 852 (citation omitted). *Accord Shirey v. Bensalem Township*, 663 F.2d 472, 476 (3d Cir. 1981) ("Thus, one of the factors which the Court has considered significant . . . is whether the party has sought preliminary injunctive relief."); *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981) ("[W]e think plaintiffs are hard pressed to demonstrate that the instant order has any *immediate* consequences of a serious nature, or that they will suffer 'irreparable harm' pending final disposition of the case in the district court.") (emphasis in original). Thus, the First, Third and Federal Circuits have merely opined that, in the cases before them, the appellants' failure to press a motion for preliminary injunctive relief was evidence of a lack of need for interlocutory review.

In analyzing the case before it, the Second Circuit acknowledged the weight other courts had placed on the failure of the appellant to pursue preliminary injunctive relief. It agreed that such conduct should be viewed as a measure of the sufficiency of appellants' showing of "irreparable harm" to be suffered without an immediate appeal. *Volvo v. MIPTC*, 839 F.2d at 75 (Petition at A14) (citing *South Bend Consumers Club, Inc. v.*

why such relief should not be granted. The district court made clear that a motion for preliminary injunctive relief would also be denied if made. While *Volvo* was contemplating an appeal from the district court's denial of its application, subsequent events made moot its application.

United Consumers Club, Inc., 742 F.2d 392, 394 (7th Cir. 1984); *Shirey v. Bensalem Township*, 663 F.2d 472, 476-77 (3d Cir. 1981)).

Where, as here, however, the Complaint alleges a pervasive and continuing course of unlawful action by defendants, and the record reflects that the litigation itself has acted as a preliminary injunction in forestalling the continuation of that conduct, the absence of a motion for preliminary relief in the district court is necessarily less dispositive of the need for an immediate appeal. In a case such as this one, the irreparable harm which would support a preliminary injunction is threatened only after dismissal of the claims, when such relief has been foreclosed. Thus, in reviewing the record before it, the Second Circuit found:

Plaintiffs-appellants contend that the initiation of this litigation had the effect of deterring MIPTC from pursuing the activities which threatened harm to plaintiffs-appellants, so the necessary showing of imminent harm could not have been made in support of an application for a preliminary injunction. On this record, we cannot conclude that plaintiffs-appellants' failure to seek preliminary injunctive relief below should bar this appeal.

Volvo v. MIPTC, 839 F.2d at 75 (Petition at A14).

The Second Circuit can hardly be said to be in conflict with the First, Third and Federal Circuits; indeed the Second Circuit agreed with those courts' conclusion that a request for a preliminary injunction should be considered as a factor in reviewing appealability under Section 1292(a)(1). Here, the Second Circuit simply concluded that that factor was not dispositive. Petitioners' claim that the Second Circuit will accept all appeals from denials of injunctive relief which go to the merits, and so will encourage the regular inclusion of a meritless claim for injunctive relief in every complaint, is simply illusory. To the contrary, the Second Circuit specifically warned against the practice of " 'appending perfunctory requests for injunctive relief to complaints as a device to secure immediate appeal of all orders.' " *Volvo v. MIPTC*, 839 F.2d at 76-77 n.7 (Petition at

A18, n.7) (quoting *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1472 (11th Cir. 1985)). See also *Chasser v. Achille Lauro*, *supra*. Without a showing of serious, perhaps irreparable consequence, as required by *Carson*, the Second Circuit has ruled it has no jurisdiction under Section 1292(a)(1).

Petitioners contend that they seek review in the Court because the Second Circuit misinterpreted the Court's decision in *Carson* as a matter of law (Petition at 2). In the court below, Petitioners conceded that they intended to seek Supreme Court review because they challenged the nature of the disputed factual evidence considered by the Second Circuit. Thus Petitioners stated:

In other words, appellees are not challenging this [Second Circuit] Court's application of the law to the facts, as appellants contend. Rather, appellees contend that by considering certain kinds of disputed factual evidence, and by ignoring the objective procedural history of this case, the Court made a legal error susceptible of review by the Supreme Court.

Reply Memorandum in Support of Motion to Hold Appeals in Abeyance, dated March 7, 1988, pp. 4-5 (citations omitted).

Petitioners' recognition of the factual basis for the Second Circuit's holding here makes clear that this is not a case which is appropriate for review. The Second Circuit's determination on the factual record, and the specificity of that review of the peculiar facts at issue, make this case one which would require the Court to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); see also *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924).

In applying *Carson* to the case at bar, the Second Circuit reviewed Respondents' showing of serious, perhaps irreparable consequence. The court below properly reviewed the record in the district court and found that the continuing unlawful conduct alleged in the complaint had been effectively deterred *pendente lite* by the initiation of the lawsuit. This conclusion was

"fortified" by the Second Circuit's finding that events subsequent to the dismissal of Respondents' lawsuit on the merits established that Petitioners had launched anew their campaign against Respondents, resulting in serious, perhaps irreparable interim harm to Respondents pending disposition of the case in the district court. *Volvo v. MIPTC*, 839 F.2d at 76 (Petition at A16).¹⁰ Thus, the Second Circuit permitted Respondents' appeal on the basis of a thorough review of the unique facts before it.

10 Petitioners contend that such a factual review by the Second Circuit was improper, and that Respondents should be constrained to show the serious, perhaps irreparable consequence of delayed appellate review to the district court pursuant to Fed. R. Civ. P. 54(b). If Rule 54(b) were indeed Respondents' only avenue of relief, Section 1292(a)(1) would be supplanted, a result Congress clearly did not intend. If meant to be available only to those appellants seeking review of denials of preliminary injunctions, Section 1292(a)(1) could easily have been drafted to so provide. Rather, Congress made clear that Section 1292(a)(1) confers a *right* to appeal. No discretion lies with the district court as it plainly does pursuant to Section 1292(b). Moreover, that such a factual review was a proper determination for a Court of Appeals in the first instance is assured by the Court's decision in *Carson*. There, the factual determination of serious, perhaps irreparable consequence was made by the Court in the first instance. *Carson*, 450 U.S. 86-90 and n. 16. The Court of Appeals had ruled that the order there was not a denial of an injunction and so had never reached the issue of consequence. *Carson*, 450 U.S. at 82. Petitioners can point to but one opinion for support of their theory (Petition at 17 (citing *Woodard v. Sage*, 818 F.2d 841)). However, even in *Woodard*, the Federal Circuit did review the showing of irreparable consequence proffered by appellants in the first instance, and merely found it unpersuasive. *Id.* at 853-55.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: June 2, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Court, hereby certifies that on the 2nd day of June 1988, he caused the annexed Brief in Opposition to Petition for Writ of Certiorari to be served on the following attorneys at the following addresses designated by said attorneys for service of papers by causing three copies of the same to be sent to said attorney in a properly addressed, first-class post-paid envelope. There are no other parties required to be served with the annexed document.

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